

PUBLIC CITIZEN LITIGATION GROUP

1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

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(202) 588-1000

BY EMAIL TO smiddleton@ali.org

May 13, 2019

Stephanie A. Middleton, Esquire
Deputy Director
The American Law Institute
4025 Chestnut Street
Philadelphia, Pennsylvania 19104-3099

Re: Your copyright claim to Professor Adam Levitin

Dear Ms. Middleton:

I write on behalf of Professor Adam Levitin in response to your contention that his posting of the Tentative Draft of the Restatement of the Law of Consumer Contracts to Dropbox (“Tentative Draft”) constitutes an infringement of American Law Institute’s (“ALI”) copyright, and your request that he take it down “immediately.” Professor Levitin’s actions are protected by fair use. His plan was to leave it posted until the conclusion of the vote on the Tentative Draft at the annual meeting, scheduled for next Tuesday, May 21, 2019.

As you know, the Tentative Draft is exceptionally controversial. Several dozen consumer, civil rights, and other advocacy organizations have written to ALI opposing the Tentative Draft, and both law enforcement officials from several states and elected federal officials have added their voices in opposition. Opposition has also been voiced by the U.S. Chamber of Commerce and trade associations for the banking, insurance, retail, and telecom industries, who have posted their arguments online. The Tentative Draft was the subject of a symposium published in the Yale Journal of Regulation.

Professor Levitin is concerned that, rather than representing a genuine effort to obtain the protections that copyright law provides, your request that he take the Tentative Draft out of public view represents a misuse of copyright to suppress the campaign against adoption of this draft. *Ty, Inc. v. Publications Intern. Ltd.*, 292 F.3d 512, 520 (7th Cir. 2002); *Lasercomb America v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990). As part of his advocacy against adoption of the Tentative Draft as currently written, he placed the Tentative Draft online at Dropbox.com to enable easy access for members of ALI to the document so that they can understand the debate and, if they so choose, add their own voices.

In his initial letters to other ALI members, Professor Levitin included a hyperlink to the

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Tentative Draft as posted within ALI's own password protected site. The recipient had to be logged into the ALI web **before** clicking the link; otherwise, the link came back page not found. In addition, because many ALI members do not readily recall their username and password for the ALI web site, the log-in requirement greatly complicated Professor Levitin's efforts to rally opposition to the Tentative Draft. Moreover, although he placed the document in Dropbox to facilitate access, the Dropbox URL is not accessible through search engines; the hyperlink is available only as embedded in Professor Levitin's emails about the Draft.

Although the main reason for using Dropbox was to provide the link to other ALI members, Levitin provided the link to a few journalists to enable them to cover the significant public controversy over the Tentative Draft. Seeing the **entire** document is necessary to understand and evaluate the Tentative Draft and the reasons for opposing it.

In this context, the temporary posting of the Tentative Draft falls well within the parameters of protected fair use. Section 107 of the Copyright Code provides, in relevant part,

[T]he fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Applying the "full balancing" that the law requires, *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 576–77 (1994); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 475 (2d Cir. 2004); *Video Pipeline v. Buena Vista Home Ent.*, 342 F.3d 191, 198 (3d Cir. 2003), Levitin's use is a fair one.

First, the purpose of his use falls squarely within the statutory definition of fair use, because the purpose of the posting is criticism: to identify the many substantive flaws in the Tentative Draft and the reasons given for its creation. Moreover, the posting is for entirely noncommercial purposes. In addition, the criticism relates to issues of intense public interest. "The scope of the fair use doctrine is wider when the use relates to issues of public concern." *National Rifle Ass'n v. Handgun Control Fedn. of Ohio*, 15 F.3d 559, 562 (6th Cir. 1994), citing *Consumers Union v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983). Hence, the first factor strongly favors a finding of fair use.

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Second, the copyrighted work is a set of legal standards that are intended to guide judicial decision-making as “‘authoritative’ sources on the meaning” of the common law. *See Code Rev. Comm. v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1248 (11th Cir. 2018). Regardless of whether the Restatement is or is not copyrightable as a statement of “the law,” any copyright protection for this sort of work is fairly thin. Consequently, the second factor is at best neutral.

Turning to the third factor, in an email to Professor Levitin, you suggested that your main reason for contending that the online posting of the Tentative Draft is not fair use in that “fair use is excerpts.” That misperception is common, but incorrect. “[S]uch copying does not necessarily weigh against fair use” where ‘copying the entirety of a work is . . . necessary to make a fair use.’” *Stern v. Lavender*, 319 F. Supp. 3d 650, 682 (S.D.N.Y. 2018), quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006). Rather, “the extent of permissible copying varies with the purpose and character of the use.” *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013), quoting *Bill Graham Archives*. Here, the purpose of the use is to rally opposition to the prospective adoption of the entire Tentative Draft, to explain why the draft as a whole is problematic, and to allow members to understand why they should vote no and why readers should be contacting members whom they know to urge them to vote no. Only the posting of the entire draft could properly serve that purpose; indeed, posting selected portions could lead to accusations that the “vote no” campaign was dishonestly portraying the document. Consequently, the third factor does not support a conclusion of infringement.

Finally, considering the fourth factor, because the use is noncommercial, ALI would have the burden of showing likelihood that the use will cut into sales. *Assn. of Am. Med. Colleges v. Cuomo*, 928 F.2d 519, 525 (2d Cir. 1991). Your emails to Professor Levitin suggest that your concern is that the easy availability of the Tentative Draft may cut into sales that provide the main revenue to support the ALI enterprise. But, so far as we are aware, ALI sells final Restatements and other final statements, but not Tentative Drafts. Looking through the Publications section of the ALI web site, <https://www.ali.org/publications/>, I did not find any Tentative Drafts listed for sale. Draft documents are apparently available on Hein Online and Westlaw, and perhaps ALI gets a cut of those fees; but at the present time, the latest version of the prospective restatement that can be found on Hein Online and Westlaw is the discussion draft from 2017. Posting the 2018 Tentative Draft will not cut into those sales. Again, Professor Levitin planned to take down his posting after next week’s vote. As a result, his action will not compete with sales of the final version, even if the Tentative Draft is approved without any changes.

To be sure, if the current Tentative Draft is defeated, there will be no Restatement of Consumer Contracts offered for sale; and even if it passes, the criticism resulting from Professor Levitin’s campaign may result in this Restatement being less influential and perhaps having lower sales. But “[a]dverse impact that results from criticism or unfavorable comment on the copyrighted work is not considered in evaluating [the fourth statutory] factor.” *Association of American Medical Colleges*, 928 F.2d 525.. Criticism “may quite legitimately aim at garroting the original, destroying

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it commercially,” *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986), but that sort of market effect does not defeat a claim of fair use under the fourth factor.

Professor Levitin has made fair use; he and other opponents of this proposal are entitled to expect fair play from ALI’s leadership.

Sincerely yours,

A large, stylized handwritten signature in black ink, which appears to read "Paul Alan Levy". The signature is written over the typed name and extends to the right of the page.

Paul Alan Levy